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January 27, 2011

228706

Surface Transportation Board
Attn: Docket No. EP 704
395 E Street, S.W.
Washington, DC 20423-0001

Re: Notice of Intent to Participate at Oral Hearing February 24, 2011
*Review of Commodity, Boxcar and TOFC/COFC Exemptions*, No. EP 704

Greetings:

Enclosed for filing are the original and ten (10) copies of the "The Mercury Group (A Shipper-Based Mobile Energy Study Group) and Breakthrough Fuel LLC, Joint Verified Statement". A duplicate of this letter and return mail envelope, postage prepaid, is enclosed for your stamped verification of receipt.

The Mercury Group and Breakthrough request that their representative, Craig S. Dickman, written testimony enclosed, be afforded five (5) minutes, at the oral hearing February 24, 2011, to address key topics of the testimony, as follows:

- Indexed fuel surcharges, to the detriment of the nation's competitiveness, block understanding of the energy consumed in moving products to market, hence, block informed supply chain management, including management of carbon emissions, inhibit use of alternative fuels and perpetuate economic distortions.
- The marketplace offers alternatives to indexed fuel surcharges that provide transparency to fuel consumed, costs and emissions, at the level of individual freight shipments.
- The question for this Board: Are the Exemptions, combined with Class I consolidation, a barrier to the railroads' adapting readily to changes in the marketplace offered by alternatives to indexed fuel surcharges?

Sincerely,

DEWITT ROSS & STEVENS S.C.

John Duncan Varda

JDV:mc/mso

Enclosures

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

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**REVIEW OF COMMODITY, BOXCAR AND TOFC/COFC EXEMPTIONS**

**STB Docket No. EP 704**

228706

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**THE MERCURY GROUP**
**(A Shipper-Based Mobile Energy Study Group)**

**And**

**BREAKTHROUGH FUEL LLC**

# JOINT VERIFIED STATEMENT

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Breakthrough Fuel LLC

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Dated: January 27, 2011
Due: January 31, 2011

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# JOINT VERIFIED STATEMENT OF THE MERCURY GROUP (A Shipper-Based Mobile Energy Study Group) and BREAKTHROUGH FUEL LLC

## IDENTIFICATION

**Witness Craig S. Dickman.**

Craig S. Dickman is the Chief Executive Officer of Breakthrough Fuel, LLC ("BTF"). His office is located at BTF's principal place of business, 1385 West Main Avenue, DePere, Wisconsin, 54115.

**The Mercury Group.**

The Mercury Group is a shipper-based mobile energy study group focused on best practices and market innovations to reduce the energy consumption, energy costs and emissions associated with the movement of products to market.

The Mercury Group was organized in 2008 and operated under the auspices of Breakthrough Fuel LLC and traditional shipper association antitrust compliance guidelines. The Mercury Group's participants include

market leading companies across the consumer goods industry, food industry, paper industry, retail, building products, manufacturing and machinery industries.

**Breakthrough Fuel LLC.**

Breakthrough Fuel LLC works with shippers to understand, manage and reduce the amount and cost of energy used to move their products to market. This begins by providing market transparency throughout the client's mobile energy lifecycle, enabling an understanding of the unique energy consumption, energy cost and emissions associated with its product movements. With this understanding, BTF and the shipper work to develop and execute strategies focused on reducing the amount and cost of energy consumed and the mobile emissions that occur in the movement of the shipper's products to market.

Since 2005, BTF has been the innovator in mobile energy lifecycle management. BTF has been awarded US Patent, No. 7.729,998, *Method for Shippers to Manage Fuel Costs* for its fuel surcharge replacing "Fuel Recovery Program." BTF's clients include market leading companies across the consumer goods industry, food industry, paper industry, retail, building products, manufacturing and machinery industries.

## STATEMENT

**Fuel Surcharge and Reasonable Practices.**

In *Rail Fuel Surcharges*, STB Ex Parte No. 661, decision

1/25/2007, the Board was unequivocal in its finding rate-based fuel surcharges to be misleading and an unreasonable practice:

> [T]he term "fuel surcharge" most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied. **If it is used instead as a broader revenue enhancement measure, it is mislabeled.** This sort of mislabeling appears designed to avoid the type of response a carrier would likely receive if it were to honestly inform a shipper that a higher rate was being imposed to recover not only the increased fuel cost of serving that shipper, but also the increased cost of fuel for another shipper's traffic – which is what would often occur under rate-based fuel surcharges. . . . **We believe that imposing rate increases in this manner**, when there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied, **is a misleading and ultimately unreasonable practice.**

*Id.*, p. 7 (emphasis added). Although the Board concluded not to implement a proposal to extend its ruling to exempted traffic, its conclusion was predicated on certain factual assumptions (*i.e.*, based on decades old "prior findings") about the marketplace based on the record before it in 2007 in Ex Parte No. 661:

> We are persuaded by the comments that we should not implement this aspect of the August proposal. The exemptions are based on prior findings that there is a sufficiently competitive market for the transportation involved that regulatory protections are not needed. The exemptions permit the traffic involved (including intermodal traffic) to benefit from a competitive marketplace free of regulatory interference. **Under the exemption, trucks and railroads compete on an equal footing for intermodal traffic, for example, with each competitor capable of adapting readily to changes in the marketplace. If we revoke the exemption, even partially, the railroads would be restricted in how they can respond to changes, while trucking companies would not.** This kind of imbalance could have unintended consequences and upset the competitive balance between railroads and trucks.

*Id.*, p. 13 (emphasis added). The Board's factual assumption is that the Exemptions – "based on [decades old] prior findings" – make "each competitor capable of adapting readily to changes in the

marketplace" and that, even in the event of a partial revocation, "the railroads would be restricted in how they can respond to changes" in the marketplace.

Investigation of the advent of marketplace alternatives to the indexed fuel surcharge will challenge the Board's prior findings and permit it to replace assumptions about the relation of the Exemptions, fuel surcharges and the marketplace with findings of fact based on conditions in the present day marketplace.

**Fuel Surcharge – It's Not Just About "Labels" Anymore.**

In *Rail Fuel Surcharges*, STB Ex Parte No. 661, decision 1/25/2007, the Board focused particularly on labels and "mislabeling" as an unreasonable practice. Although the Board wisely chose not to prescribe an index, the Board did go so far as to encourage use of a particular index:

> While we encourage carriers to use the EIA Index, we will not mandate its use. We are concerned that we not hinder the Board's ability to respond nimbly should a superior index be identified

*Id.*, p. 11. Likely because the Board was not presented evidence of marketplace alternatives to indexed fuel surcharges, the Board, also, found:

> We do not believe that it is necessary or appropriate at this time to adopt any of the other linkage suggestions made by the commenters, as summarized above, such as requiring railroads to separately identify the fuel cost component in their base rates.

*Id.*, p. 10.

An investigation of the adverse impacts of indexed fuel surcharges and of marketplace alternatives (described below) will demonstrate that the indexed fuel surcharge issue and timeliness of the response of the Nation's Rail Network to such marketplace alternatives is not merely a question of unreasonable practice in "labeling". Rather, the indexed fuel surcharge issue and timeliness of the railroads' response to marketplace alternatives has broader, substantive implications for the national "Rail Transportation Policy" and the relationship of the Exemptions to the present state of competitiveness of the Nation's Rail Network.

**Indexed Fuel Surcharges Block Energy Life Cycle Transparency.**

Fuel surcharge programs, which have been the transportation industry standard for decades, normally use an index, such as the U.S. Department of Energy's "Energy Information Administration On-Highway Diesel Fuel Retail Price Index" ("EIA Index"). While the EIA Index can provide base trend information on retail diesel prices, it does not provide any direct relationship to the energy used by a shipper's freight movement or the fuel costs experienced by the transportation carrier.

The indexed fuel surcharge approach, whether employed for truck, intermodal or rail freight movements, does not allow for the visibility or understanding necessary for shippers to effectively manage this important cost component in the movement of their products. The problem created by this lack of transparency occurs on several levels:

***Fuel surcharges block informed decision making.*** Fuel surcharge programs, and in particular, percentage-of-revenue based programs, do not enable the shipper to know the amount of energy that is consumed in the movements of their products. As such, fuel consumption is not part of the shipper's decision process in key supply chain management decisions that could benefit from this understanding. Decisions such as ship location selection, distribution center siting, carrier selection, network design and mode selection, all of which would benefit from an understanding of fuel consumption, necessarily exclude energy from the decision process. This lack of understanding, and no clear metrics, makes improvements in energy consumption very challenging for shippers.

***Fuel surcharges block management of emissions and carbon foot print.*** Lack of visibility to fuel consumption also makes it difficult to understand the emissions associated with freight movements. While some distance-based models exist for calculation of mobile carbon footprints or emissions, they are approximations at best. To accurately calculate a shipper's mobile carbon footprint, visibility to the amount of energy used in the movement of products is necessary. Without visibility to their carbon footprint, it is difficult for shippers to develop and employ strategies for carbon reduction.

***Fuel surcharges inhibit use of renewable and alternative fuels.*** Lack of visibility to a shipper's carbon footprint also inhibits strategies for

the inclusion of renewable and alternative fuels into their supply chain. Without clear understanding and metrics around energy use and emissions, the potential market advantages of alternative fuels are hidden; and it becomes difficult, if not impossible, to create a business case for change.

***Fuel surcharges perpetuate economic distortions.*** Indexed fuel surcharges also mask the real cost of fuel and creates economic distortion for virtually every freight movement. This economic distortion exists in multiple levels:

- ***Timing***. The EIA Index is published once-per-week although actual fuel prices update daily. As a result, and by design, the economic distortion increases each of the six days after the publish date. Further, on weeks with national holidays or when the DOE office is closed (for weather or other reasons), the distortion can extend beyond the six-days and grow even larger.
- ***Geography***. Virtually all indexed fuel surcharges use a national average fuel price although real fuel prices vary significantly by geography. A 500-mile movement, leaving from Columbus, OH, would experience very different fuel costs depending on whether it was headed to New York, Georgia or Missouri. This not only creates challenges for transportation carriers – and wide variances in how effectively they are reimbursed for actual fuel costs – but also hides the business impacts of fuel price differences and

inhibits carriers and shippers from making decisions in their own economic interests. Using national averages also can have unintended consequences, such as masking market efficiencies in states or regions that would enhance their competitive position. It also can place artificial stresses on infrastructure whereby decisions which would normally be based on market economics are made without consideration of the underlying efficiencies of the market.

- ***Fuel Taxes***. Similar to the geographic distortion, using national averages also creates tax-related economic distortion as well. Not only is there a wide variance of on-highway diesel fuel tax rates by states, there is a much wider variance between rail-related taxes by state. And further, since intermodal fuel surcharges typically use the EIA On-Highway Index, there is even greater distortion between fuel surcharges and the actual costs incurred by the transportation carrier.
- ***Retail Prices***. The EIA Index uses a sampling of posted-retail diesel fuel prices for its price determination although most commercial transportation fuel is purchased at significant discounts with both retail discount price programs and cost-plus price programs.

The combination of these factors – all creating economic distortions which

layer on each other – creates a significant and widely varying difference between the economics represented by the indexed fuel surcharge and the actual fuel market costs.

The inability of indexed fuel surcharges to provide information or understanding of fuel costs, consumption or emissions prevents shippers from making rational decisions regarding the energy used in the movement of their products. It also creates artificial market behavior and distorts economics in certain public policy areas.

**Energy Life Cycle Transparency Is Important to Competitiveness.**

Energy is becoming an increasing important consideration in the competitiveness of the shipper's products, of the transportation carrier's services and of several related stakeholders such as alternative fuels industry, as well as individual communities and states.

For the shipper, energy is becoming an increasingly significant segment of overall costs of moving products to market. As such, effective energy lifecycle decisions can directly impact both the economic and market competitiveness of the shipper's products. Making better decisions, however, requires that there be energy transparency and quality information.

When a shipper has transparency of key energy information – the energy consumed by the freight movement, the cost of energy consumed

and the carbon emissions of the movement – then, the shipper can actively manage fuel in a manner to enhance its competitive position. For example:

- Including fuel efficiency in freight routing decisions, inclusive of both transportation mode and transportation carrier;
- Considering fuel costs and fuel taxes in ship location decisions, both for individual freight movements or when siting ship locations;
- Engineering freight networks focused on reducing unnecessary miles and eliminating fuel wasted through empty miles, inefficient routes or excessive idle behavior;
- Creating collaborative programs – between shippers and carriers – to develop initiatives focused on reducing consumption and fuel costs;
- Leveraging information to negotiate fuel discounts to reduce the overall price of fuel; and
- Converting select movements to alternative transportation fuels to reduce fuel costs or transportation emissions.

The ability to make these decisions, and many others, is enabled through fuel information transparency which strengthens competitiveness of shipper's products in the marketplace.

Transportation carrier services, and their market competitive position, are also enhanced with effective fuel information transparency.

To accomplish this, two conditions are necessary: (a) full transparency of fuel information must be available and; (b) reimbursement for fuel, between the shipper and the carrier, must be based on the actual fuel information provided by the transparency. Once those two conditions are met, then, the information is used to:

- Eliminate additional line-haul pricing that carriers typically add to rates to protect them from times when the economic distortions (discussed previously) are to their disadvantage. Elimination of this "waste" enables carriers to more competitively price their services.
- Enable fuel efficient providers and modes to effectively market their services and obtain the benefit of their fuel efficiency. Existing programs average all providers to an industry norm and, as a result, the more fuel efficient providers do not gain the full value of their advantageous performance.
- Create a level playing field for carriers. Currently, carriers with the greatest market leverage, typically the larger carriers, can obtain fuel price discounts unavailable to the majority of carriers; and they can leverage this fuel price advantage to create an artificial price advantage.
- Allow transportation providers and modes the ability to reliably present their energy management – cost and emissions – to the

marketplace and allow the more efficient providers to effectively gain market share.

Simply, whether the carrier is a truck/drayage provider or a rail/intermodal provider or an all-highway or all-rail provider, transparent fuel information allows energy efficient carriers and modes to present this information to the marketplace in a reliable, credible manner. Given both the marketplace and public policy environments, it is likely that the more efficient providers will gain a competitive advantage and, in the process, allow shippers to get their products to market more competitively.

In addition, there are several stakeholder groups that will benefit from fuel information transparency. By way of example:

- The alternative fuels industry, which should benefit from market and public sentiment for reduced emissions and renewable fuels, is at a disadvantage with the current fuel surcharge methods. When shippers have the ability to make decisions on energy costs and emissions, it is likely that alternative fuels will become more competitive.
- States which have lower fuel prices and taxes would benefit from energy market transparency. Currently, all fuel costs and taxes are blended into a national average. This creates an unintended advantage for high cost states whose costs are not accurately reflected in the marketplace. On the opposite side, states with

lower fuel costs and taxes are currently disadvantaged because their natural advantage is not apparent to the decision makers at the shippers. Another example of this lies in the 2008 period when fuel prices spiked dramatically. Select states offered fuel tax reductions to allow products to move to markets more economically. In this case, however, the producers/shippers in those states gained no advantage because the tax changes were masked by the fuel surcharge programs.

- Consumers will benefit from the increased information and improved decisions enabled by fuel information transparency.

**Alternatives to the Fuel Surcharge Provide Real Transparency.**

Fortunately, the marketplace currently has alternatives to fuel surcharges that provide fuel information transparency and enables the important economic advantages discussed above.

As an example, BTF's Fuel Recovery Program enables accurate fuel information to be provided on individual intermodal freight movements. It accomplishes this by:

- Breaking the intermodal movement into its unique segments: truck drayage and rail movement;
- Determining the fuel economics on each of the individual truck movements including the distance (miles), fuel economy (mpg),

market fuel costs unique to the movement and actual fuel taxes required by the movement, calculated and updated daily; and

- Determining the fuel economics on the individual rail segment including the distance (rail miles). rail fuel economy (ton miles), market fuel costs unique to the movement and actual rail fuel taxes required by the movement, calculated and updated daily.

As a result, the BTF process provides information – to both the shipper and the transportation carriers – such as:

- The fuel consumed by the individual freight movement:
- The fuel costs directly associated with the freight movement; and
- The carbon emissions created by the freight movement.

This information is currently used:

- By shippers and carriers to understand the actual fuel costs associated with each unique freight movement;
- By shippers to reimburse transportation providers for the fuel costs incurred on the individual movement;
- By carriers to use in bidding and pricing line-haul rates;
- By shippers to assess competitive carrier bids – allowing a true comparison of total costs (line-haul and fuel) - in many cases, for the first time;

- By shippers to assess competitive mode alternatives – allowing for a true comparison of total costs (line-haul and fuel) – in many cases, for the first time;
- By shippers to assess competitive facility alternatives – such as distribution center locations – on a total cost basis;
- By shippers to understand their fuel market risk and design fuel risk programs based on actual gallon consumption and market exposures, in many cases, for the first time;
- By shippers to calculate their carbon footprint – and understand emissions – in many cases, for the first time; and
- By shippers and carriers to assess the economic and environmental impacts of alternative and renewable fuels – and to advance those impacts to the broader marketplace.

The capability to provide fuel information transparency – and the above uses – exists today. BTF currently processes over 5 million unique freight movements annually from across North America.

**How Do Alternatives to the Fuel Surcharge Enter the Marketplace?**

In the case of BTF's alternative to the fuel surcharge, in truckload and intermodal markets, BTF's Fuel Recovery Program was introduced as a component of a shipper's annual or periodic request for proposal ("RFP") from incumbent and other carriers or third-parties. Several of the early RFPs for truckload, which included BTF's Fuel Recovery Program,

encountered verbal push-back from one or another of the larger truckload carriers. In a number of instances larger truckload carriers declined to respond to RFPs which included BTF's Fuel Recovery Program. In several instances, BTF learned of efforts by fuel providers to encourage resistance to the BTF Fuel Recovery Program and to discourage participation in the direct fueling component of options offered by BTF.

BTF believes that resistance by some of the larger truckload motor carriers was based, at least in part, on vested interests in retaining revenue gains (*i.e.*, profits) from spreads between fuel surcharge revenue created by discounted fuel purchasing and hedging. Also, one of the intended consequences of the BTF Fuel Recovery Program is leveling the fuel purchasing playing field between larger and smaller truckload motor carriers. The result is that smaller truckload carriers, who did not have the sophistication or market clout to purchase fuel competitively, are enabled to become competitive in responding to RFPs, which included BTF's Fuel Recovery Program, offered by larger truckload shippers.

Thus far, the competitive balance within the truckload sector is such that those larger truckload carriers who may choose to withhold their capacity to protect vested interests in the fuel surcharge have not been able to withhold sufficient capacity to block the success of RFPs including BTF's alternative to the fuel surcharge.

**Are the Exemptions a Barrier to Energy Life Cycle Transparency?**

In *Rail Fuel Surcharges*, STB Ex Parte No. 661, decision 1/25/2007, the Board found that most railroads opposed requiring fuel surcharges to be more closely linked to fuel costs and "vigorously" objected to a proposal that the Board partially revoke the class Exemptions to extend the fuel surcharge measures the Board adopted to various categories of rail traffic subject to the Exemptions. *Id.*, pp. 3 and 5. The Board found:

> The railroads question the practicality of alternatives to rate-based fuel surcharge programs. Many assert that a fuel surcharge based on mileage would be difficult, time consuming, and expensive to implement and administer. But these assertions are largely unsupported.

*Id.*, p. 8. It seems likely, however, that such resistance by the railroads was based on vested interests in preserving the revenue value of rate-based fuel surcharges, similar to the larger truckload motor carriers' interests in blocking alternatives to preserve the revenue and other competitive benefits that they enjoy under indexed fuel surcharges.

In contrast to the truckload motor carriers, however. consolidations of Class Is combined with the Exemptions puts the Class Is in a far better position to resist marketplace alternatives to indexed fuel surcharges, if they or even one of the larger Class Is chooses to do so. An investigation of the extent and pace at which the Class Is, since 2007, have adopted mileage-based fuel surcharges for exempted traffic may be indicative of their level of resistance and the extent to which competition,

alone, is capable or incapable of requiring them to adapt to changes in the marketplace such as the availability of alternatives to indexed fuel surcharges.

Are the Exemptions a barrier to the railroads adapting readily to changes in the marketplace offered by alternatives to indexed fuel surcharges and, thus, providing carriers, shippers and the public with the benefits of energy life cycle transparency offered by those marketplace alternatives? Is such a barrier consistent or inconsistent with the national Rail Transportation Policy, 49 USC § 10101? Is partial revocation of the Exemptions necessary to carry out the national Rail Transportation Policy, 49 USC § 10502(d)?

Only an investigation of an appropriate scope by this Board will provide the answer.

**Review of Impacts of the Exemptions on Transparency Is Warranted.**

If the railroads are found to be receptive to marketplace alternatives to indexed fuel surcharges, then, partial revocation of the Exemptions is not necessary. If, however, the transportation marketplace is not sufficiently competitive to assure that the railroads readily adapt, then, partial revocation may be an appropriate means for the Board to assure public and private stakeholders the benefits of energy life cycle transparency consistent with goals of the national Rail Transportation Policy.

The statutory mandate to the Board, 49 USC § 10502(d), provides:

> The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

Among implicated elements of the national Rail Transportation Policy are: 49 USC § 10101(1), rate competitiveness; (4), system competitiveness, (5), coordination among modes; (8), health and safety of air emissions; and (14), energy conservation.

## CONCLUSION AND REQUESTED ACTION

The post-Exemption consolidation of the Class Is, the history of the industry adoption of essentially uniform rate-based fuel surcharges and the railroads' resistance to alternatives to rate-based fuel surcharges, together with the emergence of demonstratively viable marketplace alternatives to indexed fuel surcharges, generally, warrant investigation by the Board. We very much prefer a transportation marketplace that is sufficiently competitive to assure that the railroads are receptive to and readily adapt to marketplace alternatives to indexed fuel surcharges, without revocation or partial revocation of the Exemption.

BTF requests that the Board institute an investigation of the Exemptions and specifically investigate the implications and impacts of indexed fuel surcharges including: (1) adverse impacts of indexed fuel surcharges on energy life cycle transparency; (2) nimbleness of the railroads adaptation or their resistance to marketplace alternatives to

indexed fuel surcharges; (3) requiring railroads to separately identify the fuel cost component of their base rates; and (4) any other considerations regarding energy life cycle transparency that may be necessary to carry out the national Rail Transportation Policy.

Dated this 27rd day of January, 2011.

[See the next page, following, for Verification.]

**Verification**

I, Craig S. Dickman affirm and verify that I have read the foregoing Statement of Breakthrough Fuel LLC, know the facts stated therein to be true and correct to my own knowledge and, as to those stated upon information and belief, I reasonably believe them to be true and correct.

Craig S. Dickman

STATE OF WISCONSIN )
) SS
BROWN COUNTY )

Personally came before me this 27 day of January, 2011, the above named Craig S. Dickman, personally known to me to be the person who executed the foregoing verification and acknowledged the same.

Notary Public, State of Wisconsin

My commission January 30, 2011.